

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION**

**McNEIL SECURITY, INC./ZKD, INC.<sup>1</sup>**

Employer

and

**Case 3-RC-11490**

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, AFL-CIO, DISTRICT 65**

Petitioner

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that McNeil Security, Inc./ZKD, Inc. (herein called the Employer) is a Virginia corporation engaged in the provision of security services at Greater Rochester International Airport (herein called GRIA) in Rochester, New York. The Employer has a contract with Transportation Security Administration (herein called TSA) valued in excess of \$50,000.

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<sup>1</sup> The name of the Employer is amended herein to reflect its correct legal name.

3. The parties stipulated and I find that the Employer is not subject to the Railway Labor Act, is not created by the United States Government, and is not an arm or department of the United States Government.<sup>2</sup>

4. The parties stipulated and I find that the Employer is not a joint employer with TSA.

Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

5. The parties stipulated and I find that International Association of Machinists and Aerospace Workers, AFL-CIO, District 65 (herein called the Petitioner) is a labor organization that admits non-guard employees into membership.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The petition seeks a bargaining unit of all full-time and regular part-time security screeners and lead security screeners employed by the Employer at the Greater Rochester International Airport, located in Monroe County, Rochester, New York, excluding office clerical employees, professional employees, managerial employees, supervisors and guards as defined in the Act.<sup>3</sup>

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<sup>2</sup> The National Mediation Board has asserted jurisdiction over pre-departure security screeners employed by entities other than the airlines on the basis that the work is the type traditionally performed by the airline employees and the airline retains direct or indirect control over the employees, See United Parcel Service, Inc., 318 NLRB 778, 779 – 780, n. 7 (1995). I note in the instant case that there is no evidence, nor has any party asserted, that any common carrier retains control over the Employer. Accordingly, I find it appropriate to retain jurisdiction over the petitioned-for unit of employees herein. See Andy Frain Services, Inc., 310 NLRB No. 84 (1993)(Board asserted discretionary jurisdiction over unit of airport security personnel who provided airport screening services.)

<sup>3</sup> The parties stipulated at the hearing that the classifications of supervisor, deputy site manager and site manager are supervisory positions as defined in Section 2(11) of the Act.

The sole issue presented herein is whether the petitioned-for employees are guards under Section 9(b)(3) of the Act. The Petitioner claims that the petitioned-for employees are not guards and are eligible for inclusion in a bargaining unit represented by the Petitioner. The Employer contends that the petitioned-for employees are guards and that, because the Petitioner admits non-guard employees into membership, the Petitioner cannot be certified as the representative of the proposed unit herein. Based on the record evidence and relevant Board law, I find that the petitioned-for employees are guards under Section 9(b)(3) of the Act and, accordingly, cannot be represented by the Petitioner.

### **FACTS**

On November 19, 2001, in response to the terrorist attacks on the United States on September 11, 2001, Congress passed the Aviation and Transportation Security Act (ATSA), Pub L. 107-71, 115 Stat. 592, 49 U.S.C. Section 114, which directed to the federal government the responsibility for airport security, and resulted in the creation of TSA. Under ATSA, TSA is wholly responsible for the security screening of all passengers and property carried aboard passenger aircraft. This responsibility includes the hiring, training and employment standards of security screeners. Pursuant to ATSA, TSA is required to staff each airport with a Federal Security Manager to oversee the screening of passengers. While ATSA called for the federalization of all screeners at all airports nationwide, ATSA Section 110(b), 49 U.S.C. Section 44901(a) gave to TSA the authority to contract with qualified private screening companies for the provision of screening operations during a two-year pilot period at a maximum of five airports, or at any airport three years following the enactment of ATSA, subject to the conditions set forth under ATSA Section 108(a), 49 U.S.C. Section 44919 and 44920.

In 2002, TSA published a request for proposals from private entities to enter into performance-based contracts for the provision of passenger and baggage screening services. In

its statement of objectives, the TSA proposal states: “It is imperative that the Contractor(s) selected for this effort provide all screening services in order to ensure the safety of the flying public.” Five airports were subsequently chosen for the pilot program: Tupelo, Mississippi; Kansas City, Kansas; San Francisco, California; Jackson Hole, Wyoming and the airport at issue in the instant petition, Rochester, New York.

McNeil Security, Inc. is a Virginia corporation that is a wholly owned subsidiary of McNeil Technologies whose emphasis is on providing security services for the transportation sector. James McNeil is the CEO of both McNeil Technologies and McNeil Security, Inc. (herein called McNeil Security). Ronald Thomas is the president of McNeil Security. McNeil Security was established in October 2002, as a direct result of a contract award from TSA to provide passenger and baggage screening services at GRIA.<sup>4</sup>

Ronald Thomas testified that McNeil Security’s primary objective in obtaining the TSA contract was to establish a professional screening work force that adhered to TSA standard operating procedures to protect passengers, screen and protect belongings of passengers, and limit or prohibit individuals from entering secure or sterile areas of the airport unless they are admitted through a checkpoint.<sup>5</sup> McNeil Security’s paramount objective is to provide security services with a guard force of people that limit or deny access to places in the airport until individuals have gone through a screening process. After winning the contract, McNeil Security subcontracted the actual provision of services to ZKD, Inc., which is bound, through its contract with McNeil Security, by all of the provisions of the contract between McNeil Security and

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<sup>4</sup> TSA is a division of the Department of Homeland Security.

<sup>5</sup> The sterile area is the area of the airport used for boarding passengers for outgoing flights. It is primarily that area beyond the screening checkpoints that leads to the boarding gates where passengers board the aircraft.

TSA.<sup>6</sup> The Employer<sup>7</sup> commenced security screening at GRIA on November 19, 2002, pursuant to its contract with TSA.<sup>8</sup>

Thomas testified that in hiring its workforce, the Employer's goal was to hire personnel who were cleared or clearable at the secret security level with an emphasis on military security experience, or with a background in law enforcement. Thomas testified that the Employer was bound by the employee hiring requirements of TSA. The Employer utilized the TSA job description for security screeners posted on the TSA website to select applicants.<sup>9</sup> The TSA job description states, in part, that as a transportation security screener, the applicant will "perform a variety of duties related to providing security and protection of air travelers, airports and aircraft." The description further advised applicants that they will "be responsible for identifying dangerous objects in baggage, cargo and/or on passengers; and preventing those objects from being transported onto aircraft." The job description for lead transportation security screeners states, in part, that the screener must "implement security-screening procedures that are central to Transportation Security Administration (TSA) objectives that will serve to protect the traveling public by preventing any deadly or dangerous objects from being transported onto an aircraft." Applicants must go through a substantial screening process, including testing and security checks.<sup>10</sup> According to Thomas, approximately two-thirds of the applicants who go through the process are ineligible for hire.

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<sup>6</sup> There is no contract between ZKD and TSA. McNeil Security subcontracted the provision of services to ZKD because it specialized in the provision of security services and because several of ZKD's owners had retired from the military police branch of service.

<sup>7</sup> Throughout the remainder of this decision, the term Employer will refer to the entity McNeil Security, Inc./ZKD. The record contains no evidence with respect to whether the petitioned-for Employer is a single or joint employer and as the parties have raised no issue regarding the status of the Employer, I make no finding thereto.

<sup>8</sup> It appears from the contract that it is effective through November 18, 2004. However, the Employer gave no testimony as to when or if it will cease security screening at GRIA on that date.

<sup>9</sup> The Employer used only the TSA job description; if it deviated from this job description, it would be in violation of the contract. Every employee who was hired either saw the job description on line, or received a hard copy.

<sup>10</sup> TSA conducts an extensive background check of applicants, who are all photographed and fingerprinted at time of hire. The airport conducts a criminal check in order to receive an airport security badge. All screeners undergo prehire drug testing.

After hire, trainees go through 40 hours of classroom training and 60 hours of on-the-job training, and three hours of additional training each week.<sup>11</sup> Classroom training covers passenger relations, screening procedures, overview of security, airport site regulations, and how to handle various security issues that might arise as a result of performing screening functions. On-the-job training consists of working alongside a certified screener and performing all functions that screeners perform in either the baggage or passenger areas. The additional training each week is most often in the form of tutorials on a computer. There is no training in self-defense, the use of force, or crowd control. Trainees are required to pass a certification test in order to screen passengers and/or baggage and must be recertified each year.<sup>12</sup> Approximately 93 percent of the Employer's screeners are dual certified in both baggage and passenger screening. Screeners rotate through the various duties assigned to them.

The Employer sets wages but, pursuant to its contract with TSA, those wages and benefits must be comparable to federalized screeners. Screeners earn between \$13.70 and \$16.90 per hour and all have the same benefits.<sup>13</sup> All screeners except supervisors are paid hourly and overtime is common. Full-time screeners generally work from 11:30 a.m. to 8:00 p.m. and from 4:30 a.m. to 12:30 p.m., four days on and two days off. Security screeners must remain on duty at the end of each evening until the last departing flight leaves the ground.

The Employer's screeners, lead screeners, supervisors, deputy site managers, and the site manager are required to wear uniforms that were approved by the federal security director. The uniform consists of a white shirt and navy trousers. On the left arm of the shirt is a patch

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<sup>11</sup> The 40-hour training module was provided by Lockheed Martin under contract with TSA.

<sup>12</sup> The Petitioner is not seeking to include trainees in the proposed bargaining unit.

<sup>13</sup> The Employer's handbook indicates that employees receive benefits such as paid holidays, vacation, health insurance and 401(k) plans.

emblazoned with McNeil Security/ZKD. On the right sleeve is a patch of the American flag. McNeil/ZKD is on the front breast pocket of the shirt. Employees wear a tie as part of the uniform and the airport security badge is worn around the neck on a lanyard. The lead screeners, supervisors, and deputy site managers have collar insignia that are visible to the public. Employees must be in full uniform at all times in order to report to work.

Michael Broida is the site manager at GRIA for McNeil Security. He is responsible for the overall authority and supervision of the entire security operation at GRIA. Broida testified that he works with TSA, GRIA, and local law enforcement to enforce security rules.

Broida testified regarding the duties performed by security screeners. Security screeners work at three locations in the airport; the two passenger checkpoints located at the entrance to the concourses, called Alpha and Bravo, and the location where checked baggage is screened, called Charlie.<sup>14</sup> Charlie consists of an assembly of explosive trace detection (ETD) machines where screeners screen baggage that is then placed in the cargo of the aircraft (checked baggage) for traces of explosives or other prohibited items.

There are nine areas, called pods, for ETD screening in the baggage screening area. Each pod contains a certain number of ETD machines depending on the airline it serves. Larger airlines have larger pods with more machines. There are currently 23 ETD machines on site. The Employer is required to schedule one screener per machine during operational hours. In general, 21 machines are manned at all times during operational hours. All screening equipment in both the baggage screening and passenger screening areas is owned by TSA. Machines are tested throughout the day by the security screeners.

Baggage screeners screen checked baggage through several methods promulgated by TSA, most of which are sensitive security information (SSI) and cannot be revealed to the

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<sup>14</sup> There are two passenger concourses at GRIA.

general public. Baggage screeners check primarily for traces of explosives. After the passenger receives a boarding pass, the airline representative will direct him or her to the appropriate screening pod where the screener will ask the passenger questions to ascertain whether he/she might have any firearms or hazardous materials in the checked baggage. If the passenger answers yes to any of the questions, then additional measures are taken.<sup>15</sup> Every bag that goes into the cargo hold of an airplane is screened by the Employer. All screeners wear gloves and a certain percentage of bags are physically searched. If there is an alarm regarding a specific bag and no threat item is found, it is up to the discretion of the airline as to whether the bag is loaded onto the airplane. If the bag contains a threat item, the bag will not be permitted to fly and the airline has no discretion. There are different levels for searching bags, i.e., screening vs. physical search, that are governed by standard operating procedures and screeners have no real discretion as to which level to utilize.<sup>16</sup>

There are seven stations at each of the passenger checkpoints where passenger screening is conducted. Each checkpoint is manned by the following security screeners who encounter passengers in the following order: 1) line monitor; 2) divestor; 3) metal detector monitor; 4) x-ray monitor; 5) physical search screener; 6) hand wander and 7) exit lane monitor.

#### Line Monitor

The line monitor directs passenger flow to the appropriate lane. Each concourse has two screening lanes comprised of a walk-through metal detector and an x-ray machine.<sup>17</sup> Line monitors guide passengers to the appropriate lanes depending on traffic flow. Sometimes the

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<sup>15</sup> The testimony was unclear with respect to these additional procedures. It appears that if a passenger answers yes to a firearm, the screener is alerted to use caution when he/she opens the bag because it contains a firearm. It is unclear whether checked baggage where the passenger declares a firearm is always opened. There is no testimony with respect to what occurs if a passenger declares hazardous material in the checked baggage.

<sup>16</sup> There is no testimony in the record with respect to the standard operating procedures governing the different levels for searching bags. It appears that this information is SSI.

line monitor will assist persons with mobility disabilities, i.e., wheelchairs, through pass-through doors where they are taken down a separate aisle to be screened. The line monitor also watches the queue of passengers in line for signs of suspicious behavior, and reports such behavior to the lead screener or supervisor. During a recent incident at GRIA, a line monitor overheard a passenger in line use the word “bomb” on her cell-phone. In that instance, the line monitor prevented the passenger from entering the screening area, contacted her supervisor who, in turn, contacted law enforcement.

### Divestor

The divestor stands at the entry point of the x-ray machine and instructs passengers to remove metal items from their person and place them in bins on the x-ray belt to be examined. The divestor works with the line monitor to control the flow of passenger traffic and ensures that there is sufficient space between items on the x-ray belt. The divestor will position items in optimum placement so that the x-ray image is as clear and detailed as possible. The divestor may suggest that a passenger remove his/her shoes based on certain classified information. If a passenger fails to comply with the divestor’s instruction, the divestor is to advise the passenger that failure to comply will likely set off the alarm, which would result in secondary screening.

### Walk-Through Metal Detector (WTMD) Monitor

Passengers are screened by the WTMD monitor for alarms<sup>18</sup> as they walk through the metal detector and the WTMD monitor examines the boarding pass to determine whether passengers are selectees.<sup>19</sup> The WTMD monitor also examines the boarding pass to determine

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<sup>17</sup> Alpha concourse has an experimental machine called an entry scan three which detects trace explosive devices. At the alpha concourse, the line monitor directs selected passengers through the puffer. Passengers are either selected randomly by the airline or identified through other means that is SSI.

<sup>18</sup> The alarm is visible and may be audible at the WTMD monitor’s preference.

<sup>19</sup> A selectee is a passenger who is selected by the airline for secondary screening. The selection may be random, or based on other information that is SSI. The selectee’s boarding pass is coded to alert security screeners that secondary screening is required.

whether it is valid on that particular day on an airline that leaves from that specific concourse. If the boarding pass is not valid, the WTMD contacts his/her lead or supervisor, who tries to resolve the issue with the airline, or contacts law enforcement if necessary. If the passenger passes through the metal detector without incident, the WTMD monitor instructs the passenger to retrieve his/her items off the x-ray belt. If the passenger sets off an alarm or has carry-on baggage that contains a suspicious but unidentified object, the passenger is sent to a holding corral, an area stantioned off by nylon ropes, for secondary screening. The passenger awaiting secondary screening is not allowed into the sterile area.

#### X-Ray Monitor

The x-ray monitor examines images that appear on the x-ray monitor screen as objects pass through the x-ray tunnel. The x-ray monitor looks for threatening or suspicious items within the carry-on baggage. If the baggage contains a suspicious item that cannot be identified, the x-ray monitor calls a secondary screener for a bag search. If the passenger does not consent to the secondary screening of the passenger's person or baggage, the screener, his supervisor, or law enforcement escorts the passenger out of the sterile area.<sup>20</sup>

#### Physical Search Screener

The physical search screener conducts a physical search and/or an ETD test of baggage, and a pat-down search of passengers who set off alarms on the metal detector and the hand-held wand device. The physical search screener may swab suspicious baggage for traces of explosive devices.<sup>21</sup>

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<sup>20</sup> The screener normally escorts the passenger if the passenger is cooperative and agrees to leave the area. If the passenger becomes belligerent or makes threats, law enforcement is contacted and becomes involved.

<sup>21</sup> Swabbing is a procedure where the screener runs a device, like a piece of paper, over various surfaces of an object and then puts the paper into a highly sophisticated machine that can test for traces of explosives.

### Hand Wand Monitor

The hand wand monitor uses a hand held metal detector at a specified distance from the passenger's body and runs it over all portions of the body where a weapon might be hidden.

### Exit Lane Monitor

The exit lane monitor prevents unscreened or unauthorized persons from entering the sterile area by means of the exit lane, which is for passengers departing from incoming flights who are leaving the sterile area to go to baggage claim or ground transportation. If necessary, the exit lane monitor physically blocks an unscreened individual from entering the exit lane.

Lead security screeners perform all of the duties performed by security screeners in addition to their lead duties, which, inter alia, consist of directing the workload and tasks of security screeners and acting as intermediaries between security screeners and supervisors.

All screeners are required to watch for evidence of suspicious passenger activity, and to report any suspicious behavior to the leads or supervisors pursuant to TSA regulations.<sup>22</sup> Screeners are not charged with investigating suspicious comments, only with reporting them. Supervisors generally fill out all incident reports based on information that they receive from screeners but, according to Broida, screeners may fill out incident reports or a narrative in certain instances. All screeners have training in mediation and tension defusion, and are trained to adopt command-bearing posture. Command bearing is when a person in uniform adopts a posture and voice inflection that radiates authority and confidence. Command bearing includes voice tone, inflection and volume. Command bearing is the only method by which screeners can detain passengers. Screeners are not trained in the use of force, but can use force to defend themselves.

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<sup>22</sup> Other airline and airport employees have mandated reporting requirements under airline and airport regulations. The record is silent as to what these regulations are, to whom they apply, and the reporting requirements. Broida stated that certain employees, such as restaurant employees, are expected to report suspicious comments.

Security screeners do not carry firearms, handcuffs, batons, mace, pepper spray, or any other type of weapon or deterrent, and neither screeners nor screener supervisors have arrest powers.

If an unscreened individual enters the sterile area, called a breach, a screener would be instructed to “eyeball” (maintain visual contact) the individual until law enforcement arrives. The selected screener is given a two-way radio to communicate with AIRCOM (the airport communication center). All supervisors carry two-way radios, and all screeners working as exit lane monitors carry two-way radios. There are usually one or two other screeners at passenger checkpoints that also have two-way radios. Two-way radios are the property of TSA and the radio frequencies are licensed to the Department of Homeland Security. Guidelines for their use are issued by the Employer. TSA radios are not used for purposes other than security.

Screeners also conduct sweeps of sterile and public areas of the airport to look for suspicious items, behavior and people in various areas of the airport. Screeners assigned to conduct the sweeps are given a two-way radio so that they can contact AIRCOM or a supervisor if anything is out of order. If a sweeper sees a suspicious person or unattended baggage, the sweeper is to maintain visual contact of the person, or remain with the unattended baggage, until law enforcement or other help arrives. The sweeper may swab the unattended bag at the request of law enforcement. Broida testified that sweeps are conducted prior to opening checkpoints each morning and after closing them each night on the passenger concourses, and once every hour. However, sweeps are suspended during busy times, like early morning or late afternoon, and when screeners are otherwise occupied. Sweeps may be suspended for extended periods of time during busy travel seasons. Emergency sweeps might be called because of a security breach or a national security alert.

According to Broida, the primary function of screeners is to keep prohibited items out of secure areas of the airport. In accordance with this function, screeners sometimes confiscate

passenger property. If a screener comes in contact with a threat item such as a gun, bomb, or tools, the screener contacts a supervisor who will, in turn, contact law enforcement. When a screener encounters other items that are prohibited in carry-on baggage but which are not threat items, the screener advises the passenger that he/she has three options. The passenger can return to the ticket counter and have the item placed in their checked baggage, can deposit the item into the mail receptacle at the checkpoint mailer, or can surrender the item to the screener at the passenger checkpoint. If the passenger decides to mail the item at the checkpoint mailer, which is located in the sterile area, he/she is escorted to the mail receptacle by a screener supervisor. If the passenger surrenders the item, the screener places it in a special locked armored container and documents the item. Every prohibited item that is taken into custody by a security screener is documented and becomes the property of TSA. The items are never returned to the passenger. The decision to confiscate items from passenger luggage without advising the passenger is made pursuant to standard operating procedure. The decision is generally made by the screener who advises the supervisor. Decisions as to whether to give confiscated items to law enforcement is made by the supervisor.

The Employer provides its employees with a handbook that sets forth the rules and regulations for the Employer's personnel.<sup>23</sup> The handbook is comprised of general, special and emergency orders. Broida testified that general orders cover situations that are general in nature, such as lost and found, and will probably stand for an extended period of time. Special orders are usually of a limited duration, or designed to supplement a general order. Emergency orders are for emergency situations, such as a terminal evacuation. The handbook excludes orders regarding homeland security, threat level, red procedures, and other classified information.

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<sup>23</sup> This handbook is in addition to an Employer handbook regarding other employment terms, such as wages and benefits.

Each concourse has two retractable steel mesh gates. One gate barricades the entrance to the checkpoint; the other gate is on the side of the exit lane and seals off the machines so that neither entering nor departing passengers can access them. The Employer is responsible for closing the barriers. The exit lane monitor has a key to the retractable gates and will normally lock the barriers after the last flight of the night departs. The gates may be closed in the event of a breach. Broida testified that the gates have been closed three or four times because of a breach. The decision to close the retractable gates in the event of a breach is made by a screening supervisor.

Screening checkpoints are opened each morning by a screening supervisor, who screens incoming screeners before they begin their shift. All individuals that enter the sterile area, including pilots, first officers, flight attendants, ticket agents, airport employees and vendors are screened. Law enforcement officials assigned to GRIA are not screened. Broida testified about an incident that occurred approximately one month prior to the hearing where a manager of one of the airlines attempted to enter the concourse through the exit lane without going through screening. According to Broida, the exit lane screener stopped the manager, an argument ensued, and the manager subsequently left the area without passing through. The incident was reported to the airline. Screeners are rescreened by an on-duty screener before resuming their duties, if they enter the public area of the airport during a break period.

All employees who work at GRIA are issued, and must wear, airport security badges. There are four levels of airport security badges: white, blue, green and red. White badges are for identification purposes and are the lowest level of security clearance at GRIA. Security screeners who are issued white badges have no access to secured areas of the airport.<sup>24</sup> Leads

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<sup>24</sup> In November 2004, the checked baggage screening area will be moved to another location of the airport which will require that all screeners who are baggage or dual certified be issued blue or green badges.

and supervisors have either green or blue badges. Green badges permit access to the north ramp and blue badges permit access to the north and south ramps.<sup>25</sup> Monroe County Sheriff's Department officers have red badges and have access to all areas of the airport.

Security screeners have no responsibilities with respect to automobile checkpoints, car searches, or perimeter patrols of the airport. Automobile checkpoints are maintained by a private security firm, as are car searches.<sup>26</sup> The Monroe County Sheriff's Department maintains the perimeter of the airport. Broida testified that the airport has been at orange alert twice since September 11, 2001, but has never been at red alert. The Employer's staffing levels do not change when the alert level is raised or lowered. Broida testified that security screeners will assist law enforcement in the event of a terminal evacuation, but that such assistance would be voluntary on the part of the screeners. Emergency Order No. 2-E-04, dated January 26, 2004, states that the principal job of screeners during an evacuation is to get out safely and calmly and assemble in the parking lot. The Emergency Order further states that screeners should recognize that the public may look to them for assistance during an evacuation, and that while they are not obligated to put themselves in any danger, they should attempt to assist passengers in locating the nearest exits.

There was a labor dispute at the airport involving airline attendants and pilots since the Employer commenced security screening services at GRIA. According to Broida, the Employer's security screeners continued to work during the labor dispute.

### **ANALYSIS**

The sole issue with respect to the instant petition is whether the petitioned-for unit of employees are statutory guards under Section 9(b)(3) of the Act. Based on the evidence

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<sup>25</sup> It is unclear from the record whether leads get green badges and supervisors get blue badges, or whether the badges are issued depending on the area that the individual lead or supervisor works in.

<sup>26</sup> Currently there are no car searches routinely conducted at GRIA.

contained in the record herein, I find that the security screeners and the lead security screeners are guards within the meaning of Section 9(b)(3) of the Act.

Section 9(b)(3) of the Act prohibits the Board from certifying for purposes of collective-bargaining, a unit that includes both guard and non-guard employees. The Board will deny certification of a unit consisting of guard employees to a petitioning union where the petitioner admits non-guard employees into membership, or is affiliated directly or indirectly with an organization that admits into membership non-guard employees. MGM Grand Hotel, Las Vegas, 274 NLRB 139 (1985). The Board has noted that, in enacting Section 9(b)(3) of the Act, Congress was concerned in particular with the possible conflict of interests that might arise among an employer's guard employees during a period of industrial unrest if the guard employees are called upon to enforce the employer's security rules against their colleagues. Burns Security Services, 300 NLRB 298 (1990).

In determining whether employees are statutory guards, the Board looks at the disputed employees' responsibilities. Guard responsibilities are those typically associated with traditional police or plant security functions, such as the enforcement of rules directed at other employees; the authority to compel compliance with those rules; training in security procedures, weapons training and possession; participation in security rounds or patrols; monitoring and controlling access to the employer's premises; and the wearing of guard-type uniforms or other indicia of guard status. Wolverine Dispatch, Inc., 321 NLRB 796 (1996); Liberty Owners Corp., 318 NLRB 308 (1995). The Board predominantly examines the disputed employees' role in safeguarding the employer's premises and enforcing its rules against employees and nonemployees. See A.W. Schlesinger Geriatric Center, 267 NLRB 1363 (1983).

In Rhode Island Hospital, 313 NLRB 343 (1993), the Board found that traffic control guards, security guards, security dispatchers, and shuttle van drivers were all guards under

Section 9(b)(3) of the Act, notwithstanding that the employer maintained a guard force of private security guards. With respect to the security guards, the Board found that their responsibilities were to patrol the grounds, make periodic rounds of the cafeteria, restrooms and parking lots, and respond to calls for help from patients and staff. The security guards had keys to open locked doors and had the authority to check the identification of suspicious individuals. Regarding the dispatchers, the Board noted that they were charged with the responsibility of monitoring for suspicious activities and reporting any such activities to the appropriate individuals.

The fact that dispatchers do not personally confront employees or others, but rather merely report violations, does not defeat their guard status. Because the dispatchers' authority to observe and report infractions is not merely incidental to their other duties, but instead constitutes one of their primary responsibilities which is an essential link in the Hospital's efforts to safeguard its employees and enforce its rules, the dispatchers are guards.

Id. at 347

In the instant case, the security screeners are clearly guards as defined by Section 9(b)(3) of the Act. Their job description states that their duties relate to the "security and protection of air travelers, airports and aircraft." Their primary duty is to screen passengers and baggage for items that would threaten the safety of air travelers and their property, and threaten airline employees and the property of the airlines. Screeners are identified by badges on their uniforms as security personnel and, as contemplated by the Employer's handbook, the traveling public may well look to the security screeners for assistance during emergency situations. In addition to their screening function, security screeners are required to sweep public areas of the airport to look for any suspicious behaviors or items, and are mandated to report any suspicious activity to their supervisors who would, in turn, contact law enforcement officials. Security screeners work with law enforcement officials by maintaining eye contact of suspicious individuals or suspicious

items until law enforcement officials arrive, and may be called upon to check a suspicious item for traces of explosive devices before law enforcement takes physical custody of the item.

The Petitioner argues in its post-hearing brief that the security screeners are not guards because they do not carry firearms or other weapons, are not deputized, and have no compliance or arrest powers, but rather must enlist law enforcement in the event of passenger noncompliance with TSA, airport or airline violations. Petitioner's reliance on this inability to enforce compliance is misplaced. Under Section 9(b)(3) of the Act, it is sufficient to establish guard status if the employees possess and exercise responsibility to observe and report infractions in enforcing rules to protect the property of the employer, or the safety of persons on the employer's premises. Supreme Sugar Co., 258 NLRB 243 (1981); The Wackenhut Corporation, 196 NLRB 278 (1972).

The Petitioner relies on Madison Square Garden, 325 NLRB 971 (1998) (Madison Square Garden I) in support of its position that the security screeners are not guards under the Act. In Madison Square Garden I, the Board denied review of a Regional Director's decision finding that event staff who performed certain security functions were not guards. I find that case factually distinct from the instant matter. In Madison Square Garden I, the event staff served in a variety of capacities, including those of ticket takers, ushers, inspectors and guards. When acting as inspectors, the event personnel would pat down or wand patrons for contraband. As guards, the event personnel were stationed at various areas of the arena where access was prohibited. Out of the approximately 100 employees in the petitioned-for unit, only 16 to 20 acted as guards during an event. The Regional Director found no evidence that the event staff could detain anyone. The event staff did not wear badges or traditional guard uniforms, did not provide crowd control, could not arrest individuals and could not eject people from the facility.

I find Madison Square Garden, 333 NLRB 643 (2001), (Madison Square Garden II) more applicable in analyzing the status of the disputed employees in the instant case. In Madison Square Garden II, the Board considered whether certain employees with the job title “supervisor” were guards under Section 9(b)(3) of the Act. The Board noted that while the supervisors had no authority to arrest or detain or eject patrons from the facility, they had the ability to deny entry and could eject individuals with police assistance. In addition, the Board noted that the supervisors regularly patrolled the area, carried two-way radios, and wore distinctive uniforms and identification. The Board found that, unlike the event staff in Madison Square Garden II, the “supervisors” functions designed to enhance security were sufficient to establish that they were guards within the meaning of Section 9(b)(3).” Id. at 643.

In Madison Square Garden I, the event staff performed security functions that were incidental to their main duties as ticket takers and ushers during the events and, thus, they were not engaged in security functions sufficient to bring them within the definition of statutory guards. In the instant case, the security duties of the security screeners are not incidental to their other job duties. Rather, their security duties are central to the performance of their duties as security screeners. In so finding, I note that the security screeners provide front-line security and protection to the traveling public, and to airport and airline property and personnel. Security screeners are key personnel in ensuring the safety of the airport, the airlines, passengers and employees. While security screeners cannot detain or arrest individuals, they play a central role in identifying and reporting possible security breaches. If security screeners find that that an individual or item presents a security risk, they have the authority to prevent entry of the person or item into the sterile area until a supervisor or law enforcement individual arrives. Security screeners can confiscate prohibited items, and have the authority to search baggage in the absence of the passenger. Security screeners assist law enforcement in maintaining the security

of the airport by conducting security sweeps and identifying for law enforcement any suspicious individuals or items.

In A.W. Schlesinger Geriatric Center, Inc., 267 NLRB 1363 (1983), the Board found that maintenance employees who spent 50 to 70 percent of their time engaged in security functions such as locking and unlocking doors and gates, observing shift changes, making rounds of the employer's facility, and checking lights in the parking lot and other areas were statutory guards, notwithstanding that they were required to report security problems to the police, did not have special training, did not wear uniforms, and did not carry weapons. *Id.* at 1363–1364. Similarly, in MGM Grand Hotel, Las Vegas, 274 NLRB 139 (1985), the Board found that employees who monitored security systems and reported possible security breaches but had no physical responsibilities to remedy security alarms were statutory guards.

Finally, I note that it is irrelevant that the property protected by the security screeners does not belong to the Employer. In The Wackenhut Corporation, 196 NLRB 278 (1972), the Board found that toll booth operators were guards under Section 9(b)(3) of the Act, even though they were responsible for protecting the thruway system and not property belonging to the employer. The Board noted that the toll booth operators were:

employed as guards to enforce against persons seeking to use the expressway rules to protect property and the safety of persons on the expressway premises. It is immaterial that the operators do not themselves have the power of police to ultimately determine and compel compliance by violators of the expressway rules. Rather, it is sufficient that they possess and exercise responsibility to observe and report infractions, as this is an essential step in the procedure for enforcement of the highway rules.

*Id.* at 278.

Like the toll booth operators in Wackenhut, I find that the security screeners are an essential link in the airport and airline security system. They perform a crucial role in identifying security risks and reporting those risks to law enforcement individuals. Accordingly,

I find that security screeners and lead security screeners employed by the Employer at GRIA are guards under Section 9(b)(3) of the Act. As the Petitioner is a labor organization that admits to membership non-guard employees, it cannot be certified as the bargaining representative of the petitioned-for employees herein.

### **CONCLUSION**

Based on my findings that the full-time and part-time lead security screeners and security screeners employed at GRIA are statutory guards, and that the Petitioner Union admits non-guards into membership, I hereby direct that the petition for election be dismissed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **October 13, 2004**.

**DATED** at Buffalo, New York this 29<sup>th</sup> day of September 2004.

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